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Supreme Court of the United States.

OCTOBER TERM, 1923—No. 83.

CAMPBELL & STUART, INC.,
Libellant-Appellee,

—against—

The Steamship "GUL DJEMAL," her engines, boilers, etc., Hussein Lutfi Bey, Master,
Claimant-Appellant.

BRIEF FOR THE APPELLEE.

BARKER, DONAHUE, ANDERSON & WYLIE,
Proctors for Appellee.

OSCAR R. HOUSTON, ESQ.,
EZRA G. BENEDICT FOX, ESQ.,
Counsel.

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BRIEF FOR THE APPELLEE.

Statement.

This case comes to this Court by direct appeal from the United States District Court for the Southern District of New York on a certificate of a question of jurisdiction, granted under Section 238 of the Judicial Code by the Honorable John C. Knox, United States District Judge for the Southern District of New York (fols. 143-147).

Facts.

The appellee filed a libel *in rem* against the S. S. *Gul Djemal* to recover for supplies and services rendered to the ship, at the request of her master, in the port of New York, during the month of November, 1920, which were necessary to render her fit and seaworthy for her intended voyage across the Atlantic (fols. 5-18).

The libel was filed on December 15, 1920, and the United States Marshal, pursuant to a monition issued by the United States District Court for the Southern District of New York according to the regular admiralty practice, attached the steamship *Gul Djemal,* her engines, etc., and duly filed his return (fols. 19-26).

Thereafter "Hussein Lutfi Bey, as master of the steamship *Gul Djemal,* by his proctors, Purrington & McConnell appearing specially for the purpose of objecting to the jurisdiction of the Court and to the arrest of the steamship *Gul Djemal,* and for no other purposes" (fol. 30), filed a "Special Claim and Exception to the Writ and Special Plea in Abatement" (fols. 37-48), wherein he alleged ownership and possession of the vessel by the Turkish Government and prayed for her release on the ground of sovereign immunity.

Counsel for the appellant at the same time moved and obtained an order (fols. 28-35) waiving the filing of any stipulation or security for costs and granting other minor relief. It is important to note the wording of the preamble of this order which reads:

> "It appearing to the Court that Hussein Lutfi Bey, as master of the steamship *Gul Djemal* * * * *has* filed a special claim to said steamship and a special plea in abatement for the purposes of claiming the immunity of the said steamship from arrest * * * and *has* filed exceptions to the libel on the ground that the steamship *Gul Djemal* is immune * * *" (fols. 30-31). (Italics are ours.)

It will be seen that this order is not a decision on the propriety of the claim or the competency of the master to make the same, but its only effect is to waive the usual stipulation for costs and to grant certain other minor relief.

Exceptions to the special claim (fols. 49-53) were duly filed by the libellant; and a motion was made by the claimant for the release of the steamship from arrest (fols. 55-60). This motion was denied by the District Judge (fols. 61-66).

A stipulation for value (fols. 67-81), a claim of Hussein Lutfi Bey as master (fols. 85-91), and the claimant's answer claiming sovereign immunity (fols. 92-101) were then filed, and the following stipulation of facts was also agreed upon by both parties and filed:

> "First: That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was owned by the Turkish or Ottoman Government, that it flies the Turkish flag; that Turkey has but one flag, for both national and commercial uses; that it is registered in the name of Seire-Seffain Administration; that the *Gul Djemal* is the absolute property of the Ottoman Seire-Seffain Administration, the third division of the Ministry of Marine of the Turkish Government, which is attached to the Ministry of War; that the maritime title has been given to the Administration Seire-Seffain by the Ministry of War. Said Seire-Seffain Administration, at the times above mentioned, was (and is) the Transport Section of the Ministry of Marine, and was (and is) charged with the control of transport vessels of the Turkish Government, and said vessels (of which the *Gul Djemal* was one), which are capable of commercial uses, are, when not used as transports, used in commerce; whether such vessels are used as transports or in commerce is subject to the direction of the Ministry of Marine, which through departments other than the Seire-Seffain has charge of battleships, artillery, torpedoes, wireless, and engineering work pertaining to all the vessels of the Turkish Navy; that the *Gul Djemal*

was transferred for operation to the Administration Seire-Seffain from the Ministry of War in 1914 and has since been under the control of Administration of Seire-Seffain.

Said Seire-Seffain Administration, at the times above mentioned, had (and has), as its head, a military officer of the Turkish Government, in the active or reserve service of the Turkish Government, and said head must be, at all times, a military officer in the employ of the Turkish Government, the Seire-Seffain Administration being charged with the transport of troops, and at all the times above mentioned, said head of the Seire-Seffain Administration was a Colonel; although said head of the Seire-Seffain Administration, at the times above mentioned, was in respect of the *Gul Djemal*, not functioning in a military or naval capacity.

Second: That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was in the possession of the Turkish Government, being manned by a master, officers and crew employed by or under the direction of said Seire-Seffain Administration, and paid by the Treasury Department of the Turkish Government through the Administration Seire-Seffain; said master, at the times above mentioned, was (and is) a reserve officer in the Turkish Navy employed by the branch of the Ministry of Marine known as the Administration Seire-Seffain, and the navigating officer was a Lieutenant in the active service of the Turkish Navy, both detailed by the said Ministry of Marine to serve on the *Gul Djemal* during the times above mentioned, but in such service they were not performing any naval or military functions, although they were subject to any orders from the department of the Turkish Government charged with naval or military affairs; the other officers and entire crew of the *Gul Djemal*, during the times above mentioned, were civilians, paid by the Turkish Government.

Third: That at all the times mentioned in the libel herein, and at the time of the arrest of the *Gul Djemal*, the *Gul Djemal* was engaged in commercial trade, under charter for one round voyage to George Dedeoglou, who engaged to carry passengers and goods for hire, and in such trade the *Gul Djemal* was not functioning in a naval or military capacity, nor was there anything of a naval or military character connected with the voyage of the *Gul Djemal* from Constantinople to New York and return.

Fourth: That the Turkish Government, prior to the time mentioned in the libel herein, had severed diplomatic relations with the United States of America, advising its peoples by proclamation, however, that American institutions should not be molested but should be treated as heretofore; that said diplomatic relations have not been resumed; although the United States of America maintains unofficial relations with the Turkish Government by American Consular representatives, and through the medium of a High Commissioner; that during said period of the severed relations, the Spanish Ambassador to the United States has represented, and still represents, Turkish interests in the United States, and has been recognized as such representative by the Department of State of the United States of America.

Fifth: That the Turkish or Ottoman Government, and the Government of the United States of America, are sovereign governments, and were at all the times mentioned herein, at peace with each other although the Turkish or Ottoman Government was and is an ally of the enemy of the United States in the World War" (fols. 101-114).

No claim of immunity was ever presented, either in the Court below or in this Court in this proceeding, by any one other than the master of the ship. No special

authority on the part of the master to act for his sovereign was alleged or proved.

The cause then came on for trial and Judge Knox held that the *Gul Djemal* was not immune from seizure under admiralty process and signed a decree for the libellant (fols. 128-134). His opinion appears at folios 115-127. A final decree was thereafter duly filed (fols. 128-134), awarding a recovery to the appellee against the ship.

From this decree the claimant has appealed directly to this Court, contesting the jurisdiction of the United States District Court sitting in Admiralty on the ground that the steamship *Gul Djemal* was immune from arrest under process from our Courts.

Introduction.

The question of the sovereign immunity of foreign government-owned vessels has been dealt with by the Federal Courts in a long line of cases extending from *Moitez* v. *The South Carolina*—Bee 422—F. C. No. 9697 (decided in 1781) to the present day. The tendency of the recent decisions is towards withholding immunity—*The Pesaro*, 277 Fed. 473. (An interesting and able opinion by Mack, *C. J.*, which was quoted by Judge Knox in deciding the instant case (fols. 121-123).

It might here be remarked that the cases that show a tendency to favor immunity were all decided during the war, and the opinions show that the courts were largely influenced by a desire not to delay ships that were needed to meet the pressing requirements of transportation at that time. This is true, for example, of *The Maipo*, 252 Fed. 627, decided in 1918, apparently greatly relied upon by counsel for the appellant. It is clear that such considerations of public policy no longer apply.

In spite of numerous decisions, the question whether a ship owned by a foreign government, which it uses and operates as a merchant vessel, is immune from process, "is as yet an open question." *The Pesaro*, 255 U. S. 216, 218. Its "proper solution is not plain, but debatable * * * the question is an open one and of uncertain solution." *In re Hussein Lutfi Bey*, 256 U. S. 616.

The leading case in this country on the immunity of a government-owned vessel from arrest is *The Exchange*, 7 Cranch, 116, where a public armed ship-of-war, owned, manned and controlled by a foreign government at peace with the United States, constituting a part of the military force of her nation and employed exclusively in national objects, was held exempt. "And the decision can hardly be thought to go farther." *The Florence H*, 248 Fed. 1012, 1014. As this Court itself, in *Ex Parte Muir*, 254 U. S. 522, 531, remarked, "to apply the principle or doctrine of that decision" to a government vessel engaged in ordinary trade "would be taking a long step." Also see *U. S.* v. *Wilder*, 3 Sumner, 308; F. C. No. 16694.

Moreover, at the time of the seizure of the vessel, diplomatic relations had been severed between the United States and the Turkish Government (fol. 111) and it would seem that the Turkish Government was not in a position to claim the privilege of immunity because such a claim depends upon comity and "presupposes friendship." *Russian Soviet Republic* v. *Cibrario*, 235 N. Y. 255, at page 258.

But under the peculiar circumstances of the case at bar, the interesting and important issue as to the immunity of a merchant vessel owned by a government that had severed diplomatic relations with the United States, is not squarely presented, inasmuch as the immunity (if any exists) has not been claimed by any

one entitled to vindicate the prerogatives of Turkish sovereignty.

In the present case this defect is so clear that the appellee will not burden the Court with argument on any other point.

ARGUMENT.

The plea of sovereign immunity was improperly presented, as the master is not competent to claim his sovereign's immunity.

In *Ex Parte Muir*, 254 U. S. 522, this Court indicated the three ways in which the plea of sovereign immunity should be presented, as follows (p. 532):

> "As of right the British Government was entitled to appear in the suit to propound its claim to the vessel and to raise the jurisdictional question. *The Sapphire*, 11 Wall. 164, 167; *The Santissima Trinidad*, 7 Wheat. 283, 353; *Columbia* v. *Cauca Co.*, 190 U. S. 524, or, with its sanction, its accredited and recognized representative might have appeared and have taken the same steps in its interest. *The Anne*, 3 Wheat. 435, 445-446. And, if there was objection to appearing as a suitor in a foreign court, it was open to that government to make the asserted public status and immunity of the vessel the subject of diplomatic representations to the end that, if that claim was recognized by the Executive Department of this government, it might be set forth and supported in an appropriate suggestion to the Court by the Attorney-General, or some law officer acting under his direction. *The Cassius*, 2 Dall, 365; *The Exchange*, 7 Cranch, 116; s. c. 16 Fed. Case No. 8786; *The Pizarro*, 19 Fed. Cas. No. 11,199; *The Constitution*, L. R. 4 P. D. 39; *The Parlement Belge*, L. R. 4 P. D. 129; s. c. L. R. 5 P. D. 197."

These three rules are recognized on page 13 of appellant's brief as stating the law on the point; and it is there sought to bring the case at bar within the second of the above rules, viz:

> "Or, with its sanction *its accredited and recognized representative* might have appeared and taken the same steps in its interest. *The Anne*, 3 Wheat, 435, 445-446." (Italics are ours.) *Ex Parte Muir*, 254 U. S. 522, 532.

Therefore, we shall discuss this rule only.

The Anne, 3 Wheat, 435, 4 L. Ed. 428.

The Anne, a British merchantman, was captured near San Domingo, by an American privateer during the war of 1812. In the Prize Court, the Spanish Consul appeared and claimed the restitution of the property on the ground that the capture occurred within the territorial waters of San Domingo, a Spanish possession, and, therefore, constituted a violation of the neutrality of Spain. Mr. Justice Story, writing the opinion of the Court affirming the decree of condemnation, said (p. 445) that the second question in the case was:

> "Whether it was competent for the Spanish consul, merely by virtue of his office, and without the special authority of his government, to interpose a claim in this case for the assertion of the violated rights of his sovereign? We are of opinion, that his office confers on him no such legal competency. A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. *He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted*, by virtue of his office, *with authority* to represent him in his negotiations with foreign states, or *to vindicate his*

> *prerogatives. There is no doubt, that his sovereign may specially entrust him with such authority; but in such case, his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it. There is no suggestion or proof of any such delegation of special authority in this case; and therefore, we consider this claim as asserted by an incompetent person,* and on that ground, it ought to be dismissed." (Italics are ours.)

In connection with the statement on page 13 of appellant's brief that "the sovereign owning the *Gul Djemal* had no formal diplomatic representative here," it is of interest to note that in *The Anne, supra*, "at the time on account of the unsettled state of the government in Spain no minister from that country was received by our government, but the former consuls were continued in the exercise of their functions by its permission" (3 Wheat, 435, 437). In the present case, it is undisputed that the diplomatic interests of the Turkish or Ottoman Government were being taken care of by the Spanish Ambassador (fol. 112). No reason appears why he could not have set up the claim of immunity, as he did, in fact, in another proceeding with respect to this ship, *Ex Parte Hussein Lutfi Bey*, 256 U. S. 616, which is more fully discussed hereafter.

It is submitted that the master of a vessel engaged in trade possesses no greater legal competency than a Consul to interpose a claim for restitution of property on the ground of the asserted violated rights of his sovereign "or to vindicate his prerogatives." Admitting that "Every master has a general agency for the owners," as is stated on page 14 of appellant's brief, still, it is submitted that the master of a *merchant* ship owned by his sovereign can only represent his sovereign for *commercial* purposes, and his functions are thus quite like a Consul's.

The following language of Mr. Justice Story in *The Anne, supra*, with respect to the authority of a Consul, it is submitted, is equally applicable to the master. He cannot be "considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority * * * to vindicate his prerogatives. There is no doubt, that his sovereign may specially entrust him with such authority; but in such case, his diplomatic character is superadded to his ordinary power, and ought to be recognized by the government within those dominions he assumes to exercise it. There is no suggestion or proof of any such delegation of special authority in this case" (3 Wheat 435, 445). Therefore, this Court, as in *The Anne*, should "consider this claim as asserted by an incompetent person, and on that ground, it ought to be dismissed."

In *The Sao Vicente*, 260 U. S. 151, 43 Sup. Ct. 15, this Court, in dismissing writs of certiorari brought by the Portuguese Consul General of New York in five cases involving the question of sovereign immunity, adopted and reaffirmed the rule laid down in *The Anne, supra*, quoted the passage from Mr. Justice Story's opinion set forth above in this brief, and cited in addition, *U. S.* v. *Wong Kim Ark*, 169 U. S. 649, 678; *In Re Baiz*, 135 U. S. 403, 424; *Ex Parte Muir*, 254 U. S. 522, 532; *The Pesaro*, 255 U. S. 216, 218.

In an attempt to bring the master of the *Gul Djemal* within the second rule laid down by this Court in *Ex Parte Muir*, 254 U. S. 522, 532, as an "accredited and recognized representative" of his sovereign, counsel for the appellant cite the case of *The Santissima Trinidad*, 7 Wheat. 283.

The statement of this case in the appellant's brief is inaccurate in several important particulars, and we, therefore, restate the case.

The *Independencia del Sud* was originally an American ship known as the *Mammoth*, but was sent to Buenos Aires and there sold by her owners to the United Provinces of the Rio de la Plata (a recognized belligerent), commissioned by that government as a public vessel of war, and sent out to prey upon the commerce of Spain. She proceeded to cruise off the Spanish Coast and then called at Baltimore, made some repairs and recruited some men, and her master also purchased and outfitted a smaller ship and both ships sailed to prey upon Spanish commerce. Thereafter they captured several Spanish ships, including the *Santissima Trinidad* and *St. Andre.* Later the *Independencia* entered Norfolk, having on board some cargo which had been taken by her from these two prizes.

The Spanish Consul, acting, not on behalf of his government, but on behalf of the Spanish owners of this cargo, filed a libel against this *cargo* claiming restitition on the ground that the *Independencia*, prior to the capture of the cargo in question, had violated the neutrality of the United States by augmenting her force during her call at Baltimore.

The master of the *Independencia del Sud*, Chaytor by name, opposed the libel. This Court first considered whether the *Independencia* was a public ship of war (p. 334) and it was in this connection that the Court used the language quoted in the appellant's brief, page 14. The *full* quotation on the point is as follows:

> "No bill of sale of the vessel to the government of Buenos Ayres is produced, and a question has been made, principally from this defect in the evidence, whether her character as a public ship is established. It is not understood, that any doubt is expressed as to the genuineness of Captain Chaytor's commission, nor as to the competency of the other proofs in the cause, intro-

duced to corroborate it. The only point is, whether, supposing them true, they afford satisfactory evidence of her public character. We are of opinion, that they do. In general, the commission of a public ship, signed by the proper authorities of the nation to which she belongs, is complete proof of her national character; a bill of sale is not necessary to be produced. Nor will the courts of a foreign country inquire into the means by which the title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them, in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy. The commission, therefore, of a public ship, when duly authenticated, so far, at least, as foreign courts are concerned, imports absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been the settled practice between nations; and it is a rule founded in public convenience and policy, and cannot be broken in upon, without endangering the peace and repose, as well of neutral, as of belligerent sovereigns."

The issue considered therefore was one of *title* to the *Independencia*, which was material to determine the rightfulness of the capture. No question of immunity from process was involved because no process had been issued against the *Independencia;* the libel was against the captured cargo. Furthermore, the Court did, in fact, take jurisdiction of the case, found that there had been a violation of American neutrality and awarded restitution of the cargo. The Court pointed out this very distinction, saying (p. 354):

> "* * * whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she

> brings into our ports is liable to the jurisdiction of our courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality; and if the goods are landed from the public ship, in our ports, by the express permission of our own government, that does not vary the case, since it involves no pledge, that if illegally captured, they shall be exempted from the ordinary operation of our laws."

No case is cited in the appellant's brief (and none has been found by us) that sustains the right of the master of a merchant ship to assert his sovereign's immunities from process. Without reviewing all the cases in which the question of immunity has been discussed, it is perhaps sufficient to refer to the recent decisions of this Court on the subject of immunity.

Ex Parte Muir, 254 U. S. 522.

A libel *in rem* for collision was filed against the British steamship *Gleneden*. The ship was concededly privately owned, but a suggestion was filed by *counsel for the British Embassy in Washington*, appearing as *amicus curiae*, setting out a claim for immunity on the ground that the vessel was in use as a British Admiralty transport and this was supported by an affidavit of the master affirming the truth of much that was alleged in the suggestion. The District Court refused to release the ship, and a petition for a writ of prohibition was filed by the master in this court. The Court denied the writ, on the ground that the question of jurisdiction was a doubtful one, and the granting of the writ was therefore discretionary and the Court exercised its discretion against granting the writ. On the question of practice,

the Court, after laying down the general principles above quoted, said (p. 533) of the practice actually followed:

> "But none of these courses was followed. The suggestion on behalf of the British Embassy was presented by private counsel appearing as *amici curiae*, and not through the usual official channels. This was a marked departure from what theretofore had been recognized as the correct practice (see cases last cited), and in our opinion the libellant's objection to it was well taken. The reasons underlying that practice are as applicable and cogent now as in the beginning, and are sufficiently indicated by observing that it makes for better international relations, conforms to diplomatic usage in other matters, accords to the Executive Department the respect rightly due to it, and tends to promote harmony of action and uniformity of decision. See *United States* v. *Lee*, 106 U. S. 196, 209. Of course, the suggestion as made could not be given the consideration and weight claimed for it."

The Pesaro, 255 U. S. 216.

The Italian steamer *Pesaro* was libelled by various cargo claimants and thereupon a suggestion was filed by the *Italian Ambassador* setting out that the ship was owned and operated by the Italian Government and claiming immunity. The libellants filed a traverse to the suggestion, but the Court declined to try the issue, held that the suggestion was conclusive and released the vessel. The libellants then appealed directly to this Court on the question of jurisdiction. This Court reversed the District Court, saying (p. 218):

> "* * * Apart from that suggestion, there was nothing pointing to an absence of jurisdiction. On the contrary, what was said in the libel pointed plainly to its presence. The suggestion

> was made directly to the Court and not through any official channel of the United States. True, it was accompanied by a certificate of the Secretary of State stating that the Ambassador was the duly accredited diplomatic representative of Italy, but while that established his diplomatic status it gave no sanction to the suggestion. The terms and form of the suggestion show that the Ambassador did not intend thereby to put himself or the Italian Government in the attitude of a suitor, but only to present a respectful suggestion and invite the Court to give effect to it. He called it a 'suggestion' and we think it was nothing more. In these circumstances the libelants' objection that, to be entertained, the suggestion should come through official channels of the United States was well taken. *Ex parte Muir*, 254 U. S. 522. And see *United States* v. *Lee*, 106 U. S. 196, 209. With the suggestion eliminated, as it should have been, there obviously was no basis for holding that the ship was not subject to the Court's process. What the decree should have been if the matters affirmed in the suggestion had been brought to the Court's attention and established in an appropriate way we have no occasion to consider now. An opportunity so to present and establish them should be accorded when the case goes back, as it must. Decree reversed."

Subsequently, the issues framed by the suggestion and the traverse were tried in the District Court and the Court in a very full and interesting opinion held that the vessel was not entitled to immunity.

The Pesaro, 277 Fed. 473.

This decision is now on its way to this Court for review.

Ex parte Hussein Lutfi Bey, 256 U. S. 616.

The same ship here involved was libeled on the same voyage by various libellants who claimed for wharfage, fuel, supplies, etc. Her master (who is the appellant in the present case) appeared specially, set up the claim that the ship was owned by the Turkish or Ottoman Government, and applied for the release of the ship, which was denied by the lower Court. Thereupon the master made a motion in this Court for a writ of prohibition, and, with the motion, *the Spanish Ambassador filed a suggestion* in which he set out that the *Gul Djemal* was the property of the Turkish Government and claimed immunity for her. The annexes to the suggestion were letters passing between the Ambassador and the State Department of the United States and showed that he was instructed by his government to take charge of Turkish Governmental interests in the United States and had been recognized in that capacity by the State Department.

This Court denied the motion on the ground that the jurisdiction was doubtful and should not be decided on petition for prohibition, following *Ex parte Muir, supra.*

The Sao Vicente, 260 U. S. 151, 43 Sup. Ct. Rep. 15.

Five libels, some *in rem* and some *in personam,* were filed, and the Portuguese merchant ship *Sao Vicente* was seized by the Marshal. The Transportes Maritimos do Estado appeared generally in all the cases, as owner of the ship, and filed bonds, but in its answers, which were verified by the Portuguese Vice Consul, set out that it was a department of the Portuguese Government and that both it and the ship were entitled to immunity. The lower Court sustained exceptions to these pleas in the answers. Appeals to the Circuit Court of Appeals were dismissed on the ground that they involved only the question of jurisdiction, but the Court also discussed other aspects of the cases (281 Fed. 111, 115).

Writs of certiorari were applied for by the Portuguese Consul General. The writs were granted and the cases argued, but this Court dismissed the writs on the ground that they were improvidently awarded because the Consul General was not competent, "merely by virtue of his office" to appear here for his government and claim immunity from process in the manner attempted", quoting the passage from *The Anne*, quoted *supra*, and citing other cases.

The ground upon which a consular officer is held not authorized to assert his sovereign's prerogatives is that he is a *commercial* representative, not a *diplomatic* representative, unless specially so authorized and recognized by our Government. This is clearly pointed out in the following case, which is one of the cases cited in the *Sao Vicente*.

In re Baiz, 135 U. S. 403.

Baiz was the Consul General of Guatemala at New York. He had also been appointed diplomatic representative of those countries, but the Secretary of State of the United States had declined to recognize him as such because he was an American citizen. Thereupon Guatemala appointed another man as Minister to the United States, and he served as such. Later the Minister returned temporarily to Guatemala leaving Baiz "in charge of the business of the legation", with the express consent of the Secretary of State.

In this situation a suit for the publication of a libel was filed against Baiz in the United States District Court. He objected to the jurisdiction on the ground that he could only be sued in the Supreme Court because of his diplomatic standing. The District Court

declined to dismiss the suit, and Baiz filed a petition in this Court for a writ of prohibition, which was denied. This Court discussed at length the distinction between commercial and diplomatic officers and quoted and followed the passage from *The Anne* quoted *supra*.

CONCLUSION.

In the present case, the master seems to be the only person who considers that any sovereign prerogative of the Ottoman Government has been impugned. The State Department of the United States declined to act (Appellant's Brief, p. 5). The Spanish Ambassador, who acted at the time the petition for prohibition was filed, *Ex Parte Hussein Lutfi Bey*, 256 U. S. 616, has taken no part in the present case and does not appear in the present record. The Ottoman Government itself, so far as the record discloses, has taken no steps whatever either by application to the State Department of the United States, instructions to the present appellant, or otherwise. It is not apparent why, under these circumstances, a mere private individual, Master of a merchant ship, even though a Turkish naval officer, on the reserve list (as most European shipmasters are), should have any standing to exempt his ship from the ordinary process of the Admiralty Courts.

Respectfully submitted,

BARKER, DONAHUE, ANDERSON & WYLIE,
Proctors for Appellee.

OSCAR R. HOUSTON, ESQ.,
EZRA G. BENEDICT FOX, ESQ.,
Counsel.